No. 90-235

In the Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board correctly concluded that since a layoff of employees was not the inevitable consequence of petitioner's decision to change its operations, petitioner must bargain with the union over the layoff.

2. Whether the union's post-contract termination grievances about the layoff were arbitrable under the contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 893 F.2d 1128. The decision and order of the National Labor Relations Board (Pet. App. B1-B28) are reported at 286 N.L.R.B. 817.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1990. A petition for rehearing was denied on May 31, 1990. Pet. App. D1-D2. The petition for a writ of certiorari was filed on August 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner prints bank checks at six plants. For a number of years, petitioner and Printing Specialties District Council No. 2 (union) were parties to collective bargaining agreements.[1] During the period relevant to this proceeding, the union represented production and maintenance employees at petitioner's Santa Clara facility, and the last contract between petitioner and the union expired on October 5, 1979. That contract contained a grievance-arbitration procedure for resolving "[d]ifferences that may arise between the parties * * * regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement." Pet. App. A4 n.1. The contract further provided that

> [w]henever [petitioner] intends to lay off all or part of [its] employees, [it] shall give notice of such intention no later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

Ibid.

Petitioner used two types of printing processes to print bank checks at the Santa Clara facility—the "cold-type" process and the "hot-type" process. In July 1980, petitioner decided for economic reasons to convert the facility entirely to the "hot-type" process and, as a result, laid off ten employees and gave them severance pay. Petitioner did not notify the union about the layoffs or give it an opportunity to bargain. Moreover, petitioner did not lay off those

[1] The union was the successor to Printing Specialties District Council No. 1. Pet. App. A4.

employees on the basis of seniority. Instead, petitioner laid off employees who worked exclusively or primarily on the "cold-type" equipment. Pet. App. A4-A5.

The union filed separate but identical grievances for each laid-off employee, alleging "unjust layoff . . . out of seniority." Pet. App. A6. The union asked petitioner for a meeting to discuss the layoff decision and its impact on the employees. Petitioner, noting that the contract had expired, refused to process the grievances under the contractual grievance and arbitration procedure. It also refused to bargain over the decision to lay off the employees, but offered to discuss the "effects" of the layoff on employees. *Ibid.*

2. In response to unfair labor practice charges initiated by the union, the Board concluded that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the layoff decision, by refusing to accept and process the layoff grievances, and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B1-B20.[2] The Board noted that, under *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), "employers are obligated to bargain over the effects on unit employees of management decisions" even where those decisions "are not themselves subject to the obligation to bargain." Pet. App. B9. "[U]nder the facts of this case," the Board determined, petitioner's "decision to lay off employees [was] not so inextricably intertwined with the conversion decision as to render impossible bargaining over the layoff

[2] Chairman Dotson filed a dissenting opinion. Pet. App. B21-B28.

decision." *Ibid.* The Board found that once petitioner decided to convert to the hot-type process, it had a number of alternatives—other than layoffs—for implementing that decision: petitioner could have retained cold-type employees to work on hot-type equipment, transferred those employees to its other plants or to other positions within the same plant, reduced the workweek for all employees, or adopted a system of rotating layoffs. *Id.* at B10.

Following its recent decision in *Indiana & Michigan Electric Co.*, 284 N.L.R.B. 53 (1987), the Board also concluded that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to accept and process the layoff grievances and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B5-B9. The decision in *Indiana & Michigan Elec. Co.* had two aspects: First, the Board reaffirmed that an employer may not unilaterally abrogate an existing contractual grievance procedure, nor may it refuse to process grievances under the procedure, even after the contract has expired (284 N.L.R.B. at 54-55);[3] second, in light of *Nolde Bros. v. Local No. 358, Bakery Workers*, 430 U.S. 243 (1977), the Board reexamined its treatment of the obligation of parties to an expired contract to arbitrate grievances occurring after the contract expired. The Board noted *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes and concluded that a blanket refusal to arbitrate post-expiration grievances would violate Section 8(a)(5) and (1) of the Act, absent strong evi-

[3] See *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962), enforced in relevant part, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

dence that the parties intended to exclude such disputes from arbitration. 284 N.L.R.B. at 59-60.[4] But the Board read *Nolde* as requiring an employer to arbitrate only those post-expiration grievances "arising under" the expired contract, *i.e.*, disputes concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 60.

In light of *Indiana & Michigan Elec. Co.*, the Board here rejected petitioner's contention that there was no obligation to process the grievances through the grievance procedure because the contract had expired. Moreover, the Board concluded that petitioner could not repudiate the arbitration provisions of its expired contract because the contract specified that the "stipulations set forth shall be in effect for the time hereinafter specified." Pet. App. B3; see *id.* at B5-B6.[5]

[4] At the same time, the Board reaffirmed prior decisions holding that a refusal to arbitrate a particular grievance or class of grievances—as opposed to a blanket repudiation of the arbitration procedure—is not a violation of the Act. 284 N.L.R.B. at 60 n.7.

[5] The Board, among other things, ordered petitioner (upon request) to bargain about the layoffs and to process the layoff grievances through the contractual grievance procedure. Pet. App. B15-B17, B18-B19. But the Board refused to order petitioner to arbitrate the layoff grievances, rejecting the union's contention that those grievances "arose under" the expired contract. The Board found that the layoffs that triggered the grievances occurred after the expiration of the contract, that the asserted contractual right—the right to lay off by seniority if other factors were equal—was not "a right worked for or accumulated over time," and that there was no evidence that "the parties contemplated that such rights could ripen or remain enforceable even after the contract

3. The court of appeals enforced the Board's order, but reversed, and remanded for further proceedings that aspect of the Board's decision concluding that the layoff grievances were not arbitrable. Pet. App. A1-A22. On the record presented, the court upheld the Board's determination that "the termination of employees by layoff was not the inevitable consequence of the underlying management decision." *Id.* at A11. The court thus agreed that

> [petitioner] had numerous, and admittedly feasible, alternatives that it could have explored with the Union to avoid or reduce the scope of the layoff without having to reconsider its conversion decision. [Petitioner] suggests no reason other than labor costs for preferring the layoff over any of the suggested alternative courses of action; to the extent the layoff was motivated by a desire to reduce labor costs, it was amenable to bargaining.

Id. at A11-A12. Accordingly, the court held that the Board had "reasonably concluded that the layoff * * * was a mandatory subject of bargaining as an 'effect' of the nonbargainable decision to convert from cold-type to exclusively hot-type printing." *Id.* at A12.

Turning to the Board's conclusion that the layoff grievances did not "arise under" the expired contract, the court of appeals determined that the Board had erroneously focused on "the event (the layoff) that sparked the dispute, and not [on] the substantive contract-based rights (seniority protection against layoff) that were allegedly violated." Pet. App. A19. The court pointed out that, in two later

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expired." *Id.* at B16 (internal quotation marks and citations omitted).

decisions,[6] the Board had found post-expiration disputes involving application of contractual seniority clauses arbitrable, and thus it viewed those decisions as inconsistent with the Board's holding here. *Id.* at A19-A20. Moreover, the court added, the Board's *Indiana & Michigan* standard, by focusing on whether the grievance was based on rights accruing under the contract before termination, was inconsistent with *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977), as well as with Ninth Circuit decisions construing Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185. Pet. App. A20-A21 (citing *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); *George Day Constr. Co.* v. *United Bhd. of Carpenters, Local 354*, 722 F.2d 1471 (9th Cir. 1984); *O'Connor Co.* v. *Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983)).[7]

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[6] *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

[7] Since it concluded that the Board "erred" in finding that "the layoff grievances in this case were not arbitrable, on the ground that they did not 'arise under' the expired [contract]," the court of appeals "assume[d] without deciding that the Board's *Indiana & Michigan* decision [insofar as it relies on Section 301 precedent such as *Nolde*] is a reasonably defensible construction of the section 8(a)(5) duty to bargain." Pet. App. A18.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the Board's conclusion—that petitioner must bargain with the Union over the layoff decision—conflicts with *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). There, this Court determined that the benefits of bargaining about an employer's decision to shut down part of its business for economic reasons are outweighed by the burdens such bargaining would place on an employer's conduct of its business, and thus held that such a decision was not a mandatory subject of bargaining. *Id.* at 686. Nonetheless, the Court recognized that a union facing such a nonbargainable management decision might "offer * * * alternatives that might be helpful to management or forestall or prevent the termination of jobs." *Id.* at 681. The Court therefore made plain that "the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." *Ibid.*; see *id.* at 677 n.15.[8]

Here, the layoffs were not an inevitable consequence of petitioner's management decision to convert to hot-type printing. Rather, as the record showed and the Board specifically found, petitioner had available alternatives to the layoffs and thus bargaining about these alternatives would have con-

[8] In *First Nat'l Maintenance*, the Court held that the employer had no duty to bargain about its layoff because, under the circumstances presented, the layoff necessarily followed from its nonbargainable decision to terminate its contract with the particular customer. As the Court noted, the employer in that case hired personnel separately for each customer and did not transfer employees between locations. See 452 U.S. at 668.

cerned only the "effects" of the underlying decision and not the decision itself. Pet. App. B10; see *id.* at A11-A12.[9] Accordingly, the decision below is fully consistent with *First Nat'l Maintenance.*[10]

2. Petitioner also contends (Pet. 10-15) that the court of appeals' conclusion that the union's post-contract termination grievances were arbitrable under the contract conflicts with *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977). In particular, petitioner asserts that the presumption of arbitrability recognized in *Nolde* was rebutted by the fact that the layoffs occurred almost one year after the contract expired and that the contract's no-strike clause—which was the quid pro quo for its promise to arbitrate—was limited to the contract term. Those asserted distinctions, however, are insubstantial. Although the dispute in *Nolde* arose four days after the contract expired, the Court did not hold that a grievance arising on a later date would not have been arbitrable. *Nolde*, 430 U.S. at

[9] To the extent petitioner challenges (Pet. 7-8) the Board's factual findings upheld by the court of appeals, further review is unwarranted. *E.g., Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

[10] Petitioner errs in asserting (Pet. 9-10) that the court of appeals' decision conflicts with *Arrow Automotive Indus.* v. *NLRB*, 853 F.2d 223 (4th Cir. 1988). Although the court of appeals there stated that *First Nat'l Maintenance* established "a per se rule that an employer has no duty to bargain over a decision to close part of its business," 853 F.2d at 227, the court made clear that it was not focusing on "categorization" or "labels," but was making a case-by-case application of the "analysis set forth by the Supreme Court [in *First Nat'l Maintenance*]," *id.* at 229-230. Moreover, the court in *Arrow* had no occasion to address the issues of "effects" bargaining or of what constitutes a bargainable effect. See *id.* at 225 n.2, 231.

255 n.8. Moreover, in *Nolde* the Court necessarily considered irrelevant the fact that the no-strike clause was not coterminous with the employer's duty to arbitrate, holding that "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Id.* at 255.

As petitioner points out (Pet. 12-16), the courts of appeals are divided over the test *Nolde* sets forth for determining the arbitrability of post-contract termination grievances. The Eighth and Tenth Circuits, in accord with the Board's view,[11] read *Nolde* as calling for arbitration only for those post-contract termination grievances that have vested or accrued. See, *e.g.*, *Chauffeurs Local Union 238* v. *C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (en banc), cert. denied, 479 U.S. 1007 (1986); *United Food Workers Union, Local 7* v. *Gold Star Sausage Co.*, 897 F.2d 1022, 1024-1025 (10th Cir. 1990). On the other hand, the Third, Fifth, and Ninth Circuits do not limit the reach of *Nolde* in that manner. See, *e.g.*, *Federated Metals Corp.* v. *United Steelworkers*, 648 F.2d 856, 861 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Seafarers Int'l Union* v. *National Marine Servs., Inc.*, 820 F.2d 148, 153-154 (5th Cir.), cert. denied, 484 U.S. 953 (1987); *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d

[11] In *Indiana & Michigan Elec. Co.*, the Board concluded that a dispute based on events occurring after expiration of the contract "arises under" the contract, and is therefore arbitrable under *Nolde*, only if it "concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." 284 N.L.R.B. at 60.

1159, 1162-1164 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

Each of those decisions construing *Nolde*, however, arose under Section 301 of the Labor-Management Relations Act. The decision below, by contrast, arose under Section 8(a)(5) of the National Labor Relations Act. Moreover, although the court of appeals disagreed with the Board's standard for determining whether a post-contract termination grievance "arises under" the contract for purposes of determining arbitrability, see Pet. App. A20-A21, that disagreement was only an alternative ground of decision. Initially, the court concluded that even under the Board's own standard, the holding here was inconsistent with more recent Board decisions applying that standard. *Id.* at A19-A20. This alternative ground does not implicate the issue on which the courts are divided. For these reasons, this case is not an appropriate vehicle for resolving that issue.

Finally, petitioner asserts in passing that its "refusal to allow a third person to decide a dispute between [petitioner] and the Union clearly is not a refusal to meet with the Union at reasonable times and confer in good faith." Pet. 15. The duty to bargain imposed by Section 8(a)(5) not only requires the parties to bargain in good faith with respect to the negotiation of an agreement, but also requires the employer, after expiration of the agreement, to refrain from making changes in existing terms and conditions of employment without first bargaining to impasse with the union. See *NLRB* v. *Katz*, 369 U.S. 736 (1962). Since *Nolde* holds that in certain circumstances the arbitration commitment survives the expiration of the collective bargaining agreement embodying it, petitioner's blanket refusal to arbitrate

all post-expiration grievances thus amounted to an unlawful unilateral change in an existing term and condition of employment. See *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59, 60 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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